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Supreme Court of the United States

MONICA JOHNSON,
Petitioner,

v.

CITY OF MEMPHIS,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTION PRESENTED

Whether the Sixth Circuit Court of Appeals erred in upholding the District Court's denial of the Petitioner's motion to amend her Complaint in order to reassert her wrongful death claim under new facts revealed by discovery?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Monica Johnson respectfully requests that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is published at 617 F.3d 864 (6th Cir. 2010), and is reprinted and attached to this petition at Appendix A.

STATEMENT OF JURISDICTION

On May 18, 2004, the Petitioner filed this action in the United States District Court for the Western District of Tennessee, Western Division. Jurisdiction was proper pursuant to 28 U.S.C. § 1331 and § 1343. (R.1, Complaint). The Sixth Circuit asserted its jurisdiction as follows: "Although this Court will generally review a denial of a motion to alter or amend a judgment under Rule 59(e) for abuse of discretion, when the Rule 59(e) motion seeks

review of a grant of summary judgment, . . . we apply a de novo standard of review."[1]

The Court of Appeals entered its judgment and opinion on August 24, 2010. This petition is filed within ninety days of that judgment as required by the Supreme Court Rules 13.1 and 13.3. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), which permits review by this Court from cases in the federal courts of appeal by writ of certiorari. Therefore review from a decision from the Sixth Circuit Court of Appeals is appropriate.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Tenn. Code Ann. § 20-5-113, Damages recoverable in wrongful death.

> Where a person's death is caused by the wrongful act, fault or omission of another and suit is brought for damages, as provided for by §§ 20-5-106 and 20-5-107, the party suing shall, if entitled to damages, have the right to

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[1] *Johnson v. City of Memphis*, 617 F.3d at 867 (internal citations and quotation marks omitted).

> recover for the mental and physical suffering, loss of time and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.

Tenn. Code Ann. § 29-20-205 and Tenn. Code Ann. § 29-20-310(a)[2]

STATEMENT OF THE CASE

As the caption of the original Complaint itself suggests, Petitioner had asserted two fundamental causes of action: (1) a civil rights claim under federal law; and (2) a wrongful death claim under state law. At issue is whether the Sixth Circuit Court of Appeals erred in upholding the District Court's denial

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[2]These two Tennessee Statutory Provisions are reproduced in their entirety within the Argument Section of this Petition. To avoid repetition they are not reproduced here. § 29-20-205 can be found on pages 16-19 and § 29-20-310(a) can be found on pages 19-20.

of the Petitioner's motion to amend her Complaint in order to reassert her wrongful death claim under new facts revealed by discovery. The District Court ruled that an amended complaint would prove futile, since the civil rights claim was precluded under Tennessee Governmental Tort Liability Act ("TGTLA"), Tenn. Code Ann. § 29-20-205. While conceding that the City of Memphis is shielded by municipal immunity as to the civil rights claim, Petitioner maintains that, because the TGTLA does not precluded a wrongful death action under Tennessee law, both the District Court and Sixth Circuit erred in killing two birds (i.e. the civil rights and wrongful death claims) with one stone (i.e. the TGTLA civil rights exception, under subsection (2)).

ESSENTIAL FACTS

There is but one episode-in-suit in the case at bar. In its de novo review of the facts, the Sixth Circuit recapitulates the instant facts as follows:

> This matter arose out of the death of Xavier Johnson at his home in Memphis, Tennessee on April 22, 2004. On that night, police officers Kenneth Adams ("Adams") and Melvin Rice ("Rice") were both on duty, driving separate

vehicles. At 9:11 P.M., they each received separate radio calls from their dispatcher to respond to a "911 hang call" from 619 Knightsbridge. Rice was first on the scene and notified dispatch. He approached the front of the house and found the front door wide open. He advised dispatch of the open door, then announced that the police were present. Receiving no response, he entered with his weapon drawn. Adams arrived and saw Rice inside the doorway with his weapon drawn, so he drew his own weapon and followed Rice inside. At some point after the officers entered, a second call came in to dispatch with sufficient information to classify the call as a "mental consumer."

The parties contest the following sequence of events, though the dispute does not affect this appeal. According to the Defendants, Rice, who is now deceased, told Adams he saw someone moving down the corridor ahead of them. The officers agreed they should sweep the building to make sure that no one was hurt or in need of assistance. As they rounded the corner near the stairs, Johnson appeared. Rice inquired as

to why Johnson did not respond to the officers' calls. Johnson did not answer, but instead jumped on Rice and a fight ensued. Rice pushed Johnson back into a wall, but Johnson lunged forward and grabbed Rice's gun hand. Rice yelled to Adams that Johnson was going for his gun. Adams shouted repeatedly at Johnson to get down, then fired twice at Johnson. After Adams fired, Johnson threw Rice into a wall and charged Adams. Adams retreated, yelled at Johnson to get down, and continued to fire, but Johnson reached him and hit him with enough force to throw Adams against a wall and knock him out briefly. When Adams came to his senses, Johnson was dead at his feet.

The officers later learned that Johnson was not ordinarily dangerous, but was bipolar and off his medication. Plaintiff had dialed 911 and then hung up in order to leave the house. She called again a few minutes later and informed the dispatcher of the medical situation. Sadly,

this information did not reach the officers on the scene until it was too late.[3]

Petitioner's amendment asserting her claim alleging state law negligence by the City of Memphis was predicated on the dispatcher's negligence, as newly revealed in the course of discovery. Appellant was not aware of the facts surrounding dispatcher's alleged negligence until after the depositions had been concluded subsequent to the Court's dismissal order of her state tort claims. In her proposed amended complaint, Petitioner had sought reinstatement of her state law wrongful death claim in asserting the negligence of the dispatcher at the 911 emergency call center, instead of alleging negligence on the part of police officers, as previously contended in the original complaint.

Petitioner's proposed amendment contends that the dispatcher failed to broadcast information regarding their decedent's mental condition for intervention by the Crisis Intervention Team (hereinafter "CIT") unit, which negligence, on the part of the 9-1-1 dispatchers (rather than the police

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[3] *Johnson v. City of Memphis*, 617 F.3d 864, 866-867 (6th Cir. Tenn. 2010).

officers, as originally alleged), was an efficient contributing cause of the fatal shooting of Xavier Johnson. (R.94, Order) But the District Court denied Appellant's motion to amend the second amended complaint in order to reinstate state law wrongful death claims attributing negligence to the City of Memphis stemming from "failures by the dispatcher," which decision was upheld by the Sixth Circuit Court of Appeals.

PROCEDURAL HISTORY

On May 18, 2004, Petitioner filed a complaint asserting a number of claims against the officers, the City, and the Memphis Police Department. In September, 2004, the District Court dismissed the claims against the police department, as well as Petitioner's Fifth, Fourteenth, and Fifteenth Amendment claims against the City and the individual officers. On February 3, 2006, Petitioner consented to the dismissal of most of her remaining claims, including those brought under state law. Petitioner's only remaining claim was under the Fourth Amendment pursuant to 42 U.S.C. § 1983. On August 15, 2007, Petitioner filed a motion to amend her complaint based on dispatcher negligence and to reinstate the previously dismissed state law claims

against the City. Defendants Adams and the City filed separate motions for summary judgment. The District Court denied Petitioner's motion to amend her complaint, denied Adams' motion for summary judgment, and granted the City's motion for summary judgment. Adams was later dismissed from the case with Petitioner's consent. Petitioner filed a motion to reconsider the denial of her motion to amend her complaint and the grant of the City's motion for summary judgment. The District Court denied the motion and this timely appeal followed.[4]

In her Second Amended Complaint for Civil Rights Violation and Wrongful Death, filed on June 29, 2005, Petitioner's claim for wrongful death, predicated on common-law negligence, was arguably set forth in 10:

> The MPD has a Crisis Intervention Team (hereinafter "CIT") established for purposes of responding to situation[s] involving calls where one's mental stability is in question, such as the case herein. Even though the plaintiff, Monica Johnson, and another caller advised the dispatcher that their call

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[4] *Johnson v. City of Memphis*, 517 F.3d at 867.

> pertained to a situation where the decedent's mental stability was an issue, the CIT was not dispatched by the MPD. Plaintiff avers that there are myriad instances where callers need assistance relating to circumstances of suspects with questionable mental stability. Nevertheless, the MPD has demonstrated a lax discipline in deliberate indifference to those calls which created either a delay were a failure of response causing system deficiencies.

The particular facts constituting state tort negligence by the City resulting from the dispatcher failures are alleged in Petitioner's proposed amended complaint, as follows:

> Because of her decedent's strange behavior, on April 22, 2004, at approximately 9:30 Appellant dialed 911, hung up without speaking with anyone and left the premises. (R. 82, Motion to Amend, attached Proposed Amended Complaint, ¶9.) The dispatcher at the 911 call center was told in a second call within five minutes of the first call that her decedent was bi-polar, acting strange and off his medication. (Id. ¶10). She further states

she had left the premises. (Id.). Appellant further states that the dispatcher failed to convey this information to the officers responding and failed to seek the intervention of a Crisis Intervention Team. The dispatcher had the information that the call pertained to a mental consumer for at least five minutes before Rice made the warrantless entry and confrontation which was ample time to broadcast the information for the intervention of the CIT unit. (Id.). If the information had been broadcast the officers would have taken an approach less risky and the CIT unit would have taken charge. (Id.). Appellant submits that these proposed allegations lay the proper predicate for a state tort claim against the dispatcher for negligence independently of her federal claim for Civil Rights violation pursuant to 42 U.S.C. § 1983 based on the warrantless entry.[5]

The District Court discussed supervision, oversight and training pertaining to acts by the employees such as the dispatcher, as it saw

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[5]Appellant's Corrected Brief, 16-17.

Appellant's contention in the proposed amendment and found immunity. (R.94, Order). Appellant respectfully submits she contends as previously only that the dispatcher failed to contact the CIT officers after being told of Xavier Johnson's mental problems and that is the sole the basis of her state law negligent claim against the City for negligence as opposed to lack of training.

THE SIXTH CIRCUIT'S HOLDING

The District Court denied Petitioner's motion to amend her second amended complaint to reinstate state law wrongful death claims attributing negligence to the City of Memphis based on "failures by the dispatcher" on the grounds that there was no need to amend to state a claim based on the failure of the dispatcher since the City of Memphis did not object to the sufficiency of plaintiff's original complaint and therefore declined to allow amendment on the grounds that it failed to state a claim. Petitioner, however, sought to reassert her original state law wrongful death claim based on new facts as revealed by discovery, facts that were previously unknown to all parties prior to the close of depositions. Consistent with the District Court's

position, the Sixth Circuit, in its de novo review of the facts, held:

> Plaintiff also appeals the denial of her motion to amend her complaint to add several state law claims. Plaintiff, however, appeals only the denial of permission to add her negligence claim based on the dispatcher's failure to inform the officers on the scene that Johnson was bipolar and off his medication. Plaintiff asserts that if this information had been properly acted upon, the officers would not have entered the house and a specialized unit would have been called in to resolve the situation without violence. The District Court denied the amendment of this claim as futile because of the City's sovereign immunity. We agree and affirm.[6]

The problem with the Sixth Circuit's review of the District Court's decision is that it reproduced the very same error confounding the civil rights and wrongful death claims. Both the District Court and

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[6] *Johnson v. City of Memphis*, 617 F.3d at 871 (emphasis added).

the Sixth Circuit essentially treated the Petitioner's case as a single cause of action. But the proposed amended complaint reasserted his second cause of action, under a new theory based on newly revealed evidence that was previously unknown. Throughout the procedural history of this case, this part of the caption has always remained the same: "Complaint for Civil Rights Violation and Wrongful Death." Finding that the Petitioner's civil right's claim was precluded under the civil rights exception in subsection (2) of the TGTLA was correct. Finding that the Petitioner's state law wrongful death claim was likewise precluded under the civil rights exception in subsection (2) of the TGTLA was incorrect. Whatever claims the TGTLA does not specifically preclude must, as a matter of law, be permitted, not dismissed.

SUMMARY OF ARGUMENT

The following argument is presented in the form of a legal syllogism:

I. MAJOR PREMISE: THE TENNESSEE GOVERNMENTAL TORT LIABILITY ACT (TGTLA), WHILE PRECLUDING CIVIL RIGHTS

ACTIONS, DOES NOT PRECLUDE WRONGFUL DEATH ACTIONS.

II. MINOR PREMISE: THE SIXTH CIRCUIT HELD THAT AN AMENDED COMPLAINT ASSERTING A WRONGFUL DEATH CLAIM UNDER TENNESSEE LAW IS PRECLUDED BY THE CIVIL RIGHTS EXCEPTION OF THE TGTLA.

III. CONCLUSION: THEREFORE, THE SIXTH CIRCUIT ERRED IN HOLDING THAT AN AMENDED COMPLAINT WOULD PROVE FUTILE FOR ASSERTING A WRONGFUL DEATH CLAIM.

ARGUMENT

I. MAJOR PREMISE: THE TENNESSEE GOVERNMENTAL TORT LIABILITY ACT (TGTLA), WHILE PRECLUDING CIVIL RIGHTS ACTIONS, DOES NOT PRECLUDE WRONGFUL DEATH ACTIONS.

Throughout the course of this case, the City of Memphis has principally argued that it is immune from suit through operation of the Tennessee Governmental Tort Liability Act ("TGTLA"), Tenn. Code Ann. § 29-20-205. While the Sixth Circuit may be correct in its decision insofar as the civil rights exception to TGTLA is concerned, the question arises as to whether a claim for wrongful death, predicated on negligence, is to be found under any of the exceptions in the TGTLA. It is not. Tenn. Code Ann. § 29-20-205 provides:

> Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury arises out of:

(1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;

(2) false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights;

(3) the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization;

(4) a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property;

(5) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;

(6) misrepresentation by an employee whether or not such is negligent or intentional;

(7) or results from riots, unlawful assemblies, public demonstrations, mob violence and civil disturbances;

(8) or in connection with the assessment, levy or collection of taxes; or

(9) or in connection with any failure occurring before January 1, 2005, which is caused directly or indirectly by the failure of computer software or any device containing a computer processor to accurately or properly recognize, calculate, display, sort, or otherwise process dates or times, if, and only if, the failure or malfunction causing the loss was unforeseeable or if the failure or malfunction causing the loss was foreseeable but a reasonable plan or design or both for identifying and preventing the failure or malfunction was adopted and reasonably implemented complying with generally accepted computer and information system design standards. Notwith-

> standing any other provision of the law, nothing in this subdivision shall in any way limit the liability of a third party, direct or indirect, who is negligent. Further, a person who is injured by the negligence of a third party contractor, direct or indirect, shall have a cause of action against the contractor.

Wrongful death appears in none of these enumerated exceptions.

A civil rights claim is not a wrongful death claim in and of itself, except in so far as the wrongful death constitutes the damages, whereas a state law claim for wrongful death under Tenn. Code Ann. § 20-5-113 is an independent cause of action.

Tenn. Code Ann. § 29-20-310(a) sets forth the analysis that the court must follow in making the determination of governmental entity liability:

> The court, before holding a governmental entity liable for damages, must [1] first determine that the employee's or employees' act or acts were negligent and the proximate cause of plaintiff's injury, [2] that the employee or employees acted within the scope

> of their employment and [3] that none of the exceptions listed in § 29-20-205 are applicable to the facts before the court.[7]

Under this three-pronged test, in considering whether a prima facie case exists for holding the City of Memphis liable for damages, the Court must [1] first determine that the dispatcher's act or acts were negligent and the proximate cause of Xavier Johnson's wrongful death; [2] that the dispatcher acted within the scope of her employment; and [3] that none of the exceptions in in § 29-20-205 are applicable to the facts before the Court.

The problem here is how to construe the statutory language of "none of the exceptions listed in § 29-20-205 are applicable." Both the District Court and the Sixth Circuit had found that the civil rights exception applies. But does the civil rights exception apply only to "Plaintiff's only remaining claim ... under the Fourth Amendment pursuant to 42 U.S.C. § 1983,"[8] or does it also apply to the wrongful death claim, which Monica Johnson has moved to reassert?

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[7]Tenn. Code Ann. § 29-20-310(a) (bracketed numbers added).

[8]*Johnson v. City of Memphis*, 617 F.3d at 867.

In *Limbaugh v. Coffee Medical Center*, 59 S.W.3d 73 (Tenn. 2001), the Tennessee Supreme Court held that a city could be liable for an injury proximately caused by a negligent act or omission of a city employee:

> Accordingly, we hold that section 29-20-205 of the GTLA removes immunity for injuries proximately caused by the negligent act or omission of a governmental employee except when the injury arises out of only those specified torts enumerated in subsection (2).[9]

Instantly, the Petitioner could argue that, since Xavier Johnson's wrongful death did not arise out of any of "those specified torts enumerated in subsection (2)."

The TGTLA removes immunity for injury caused by a negligent act or omission of any employee within the scope of his employment with enumerated exceptions. Here, wrongful death is not included as an exception. So the question now becomes whether the TGTLA removes"[i]mmunity from suit of" the

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[9] *Limbaugh v. Coffee Medical Center*, 59 S.W.3d 73 at 84 (internal citation omitted).

City of Memphis "for injury proximately caused by a negligent act or omission of" the dispatcher when acting "within the scope of his [her] employment" for the wrongful death of Xavier Johnson at his home in Memphis, Tennessee on April 22, 2004. Since it is established by uncontradicted evidence that the dispatcher was indeed acting within the scope of her employment (or by virtue of or under color of her office), there can be liability of the City of Memphis under T.C.A. § 29-20-205.

II. MINOR PREMISE: THE SIXTH CIRCUIT HELD THAT AN AMENDED COMPLAINT ASSERTING A WRONGFUL DEATH CLAIM UNDER TENNESSEE LAW IS PRECLUDED BY THE CIVIL RIGHTS EXCEPTION OF THE TGTLA.

The Sixth Circuit correctly held that "the TGTLA preserves immunity for suits claiming negligent injuries arising from civil rights violations."[10] The problem is that the Court looked solely to TGTLA's "civil rights" exception which "has been construed to include claims arising under 42

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[10] *Johnson v. City of Memphis*, 617 F.3d at 872.

U.S.C. § 1983 and the United States Constitution."[11] The Sixth Circuit held in relevant part:

> Tennessee codified its sovereign immunity law in the Tennessee Governmental Tort Liability Act ("TGTLA"). Tenn. Code Ann. §§ 29-20-101 et seq. Section 29-20-201(a) provides that "[e]xcept as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result" from the exercise of government duties. ... The TGTLA removes immunity for "injury proximately caused by a negligent act or omission of any employee within the scope of his employment," but provides a list of exceptions to this removal of immunity. Tenn. Code Ann. §§ 29-20-205. Injuries that "arise[] out of . . . civil rights" are one such exception, that is, sovereign immunity continues to apply in those circumstances. Id. TGTLA's "civil rights" exception has been construed to include claims arising under 42 U.S.C. § 1983 and the United States Constitution.

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[11] *Johnson v. City of Memphis*, 617 F.3d at 872.

The District Court found that "[a]ll of Plaintiff's claims against the City as an employer are in essence claims for violation of Johnson's constitutional rights." The District Court found that the claim fell under the "civil rights" exception, and that the City is therefore immune under the TGTLA. ... Plaintiff's claim regarding the dispatcher's negligence arises out of the same circumstances giving rise to her civil rights claim under § 1983. It therefore falls within the exception listed in § 29-20-205, and the City retains its immunity. ... Because the plain language of the TGTLA preserves immunity for suits claiming negligent injuries arising from civil rights violations, we find that the District Court did not err in denying Plaintiff's motion to amend and reinstate her state law claim. Because we decide this issue under the TGTLA, we need not address the related abandonment, waiver, or statute of limitations arguments. Accordingly, we affirm the District Court's grant of summary

judgment to Defendants and denial of Plaintiff's motion to amend her complaint.[12]

Arguably, the Sixth Circuit based its decision solely on the "civil rights exception" of the TGTLA.

III. CONCLUSION: THEREFORE, THE SIXTH CIRCUIT ERRED IN HOLDING THAT AN AMENDED COMPLAINT WOULD PROVE FUTILE FOR ASSERTING A WRONGFUL DEATH CLAIM.

Since Monica Johnson's state law claim does not arise solely out of her allegations that Xavier Johnson's civil rights were violated, the Sixth Circuit erred in upholding the District Court'.

The Sixth Circuit has arguably erred by effectively precluding Monica Johnson "from bringing both a civil rights action and a negligence action against a Tennessee municipality."[13] Under this line of reasoning, "the civil rights exception does not immunize the City" of Memphis "from negligent

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[12] *Johnson v. City of Memphis*, 617 F.3d at 871-872.

[13] *Alexander v. Beale St. Blues Co.*, 108 F. Supp. 2d 934, 448 (W.D. Tenn. 1999).

actions by their employees and [thus] summary judgment is not appropriate on Plaintiff's claims"[14] as to a wrongful death claim, predicated on common law negligence under state law. Indeed, while Monica Johnson had "asserted independent civil rights violations in this case, a claim of common negligence does not fall within the scope of that exception."[15]

In *Bridges v. City of Memphis*, 952 S.W.2d 841 (Tenn. Ct. App. 1997), which was a wrongful death action for the death of a fire fighter, the plaintiff's complaint, which included an allegation that defendants' failure to comply with written procedures of the fire department caused the death, contained adequate allegations of nondiscretionary, or operational, acts on the part of department personnel to withstand a motion to dismiss. Plaintiff has made argument can be made for operational negligence on the part of the dispatcher, which analysis does not

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[14] *Keys v. City of Chattanooga*, 2009 U.S. Dist. LEXIS 64532 at 12 (E.D. Tenn. 2009).

[15] *Lee v. Metro. Gov't*, 2007 U.S. Dist. LEXIS 25099 at 9 (M.D. Tenn. 2007) (emphasis added). See also *Willis v. Barksdale*, 625 F. Supp. 411, 419 (W.D. Tenn. 1985).

fall under the discretionary exception set forth in subsection (1).

Petitioner's Proposed Amended Complaint properly set forth a wrongful death claim under Tennessee's wrongful death damages statute, Tenn. Code Ann. § 20-5-113. A wrongful death claim is not among the exceptions emigrated by In what may be an issue of first impression, the principal issue is whether the statutory language of "none of the exceptions listed in § 29-20-205 are applicable" precludes going forward with a wrongful death claim under Tennessee state law, even though the civil rights exception did apply to the claim under 42 U.S.C. § 1983.

The following decision may provide the answer in holding that, while a civil rights exception may be applied to shield the city from immunity, a state law negligence claim can still go forward. Subsection (2) only restores municipal immunity for civil rights claims as such, not those for negligence as a matter of common law:

> No Tennessee case has been cited construing the difficult and awkward language in Tenn. Code Ann. §§ 29-20-205 and 205(2) as it relates to a "civil rights" claim. A reasonable

> construction of the Tennessee law relied upon by plaintiffs, not defendants, would seem to require exception from any removal of immunity as to any negligent actions arising out of invasion of one's civil rights. ...
>
> The issue is a close one, but the Court concludes that Tenn. Code Ann., § 29-20-205(2) only restores municipal immunity for civil rights claims as such, not those for negligence as a matter of common law. ... Concededly, it is unusual for a municipality under state law to have liability for one effect of a specific negligent or wrongful act, the firing of a pistol, but to be immune for another effect, the deprivation of civil rights.[16]

"To hold otherwise would preclude plaintiffs from bringing both a civil rights action and a negligence action against a Tennessee

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[16] *McKenna v. Memphis*, 544 F. Supp. 415, 419 (W.D. Tenn. 1982), aff'd, 785 F.2d 560 (6th Cir. Tenn. 1986) ((shooting of fellow officer in attempt to stop fleeing misdemeanant).

municipality."[17] Based on this reasoning, Appellant should argue that the Sixth Circuit, notwithstanding that it had cited *McKenna v. Memphis*,[18] did so without properly applying that decision to the instant case. The Sixth Circuit arguably erred in not giving proper application of the *McKenna* decision, in which both civil rights and common-law negligence claims were brought. Under *McKenna*, the clear guidance is that, while a civil rights claim may be dismissed under the civil rights exception, a common law wrongful death claim can go forward for the simple reason that no exception under Tenn. Code Ann. § 29-20-205 applies.

Other Tennessee courts have followed *McKenna*: "Thus, the civil rights exception does not immunize the City of Chattanooga and Hamilton County from negligent actions by their employees and summary judgment is not appropriate on Plaintiff's claims that Moses negligently injured him and Hamilton County employees negligently failed to

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[17] *Alexander v. Beale St. Blues Co.*, 108 F. Supp. 2d 934, 448 (W.D. Tenn. 1999).

[18] *Johnson v. City of Memphis*, 617 F.3d at 872.

provide adequate medical care."[19] "But while the plaintiffs have asserted independent civil rights violations in this case, a claim of common negligence does not fall within the scope of that exception."[20] The Supreme Court of Tennessee has acknowledged the absence of a definitive ruling on this issue:

> Several Federal cases have construed these provisions, but without the benefit of a definitive State court opinion. See *Willis v. Barksdale*, 625 F. Supp. 411 (W.D. Tenn. 1985); *Moore v. Buckles*, 404 F. Supp. 1383 (E.D. Tenn. 1975). Cf. *McKenna v. City of Memphis*, 544 F. Supp. 415 (W.D. Tenn. 1982), aff'd, 785 F.2d 560 (6th Cir. 1986).[21]

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[19] *Keys v. City of Chattanooga*, 2009 U.S. Dist. LEXIS 64532 at 12 (E.D. Tenn. 2009).

[20] *Lee v. Metro. Gov't*, 2007 U.S. Dist. LEXIS 25099 at 9 (M.D. Tenn. 2007). See also *Willis v. Barksdale*, 625 F. Supp. 411, 419 (W.D. Tenn. 1985).

[21] *Jenkins v. Loudon County*, 736 S.W.2d 603 at 24, n. 11 (Tenn. 1987), overruled in part by *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73 (Tenn. 2001)

In conclusion, what the Sixth Circuit has effectively done is to "preclude" Monica Johnson "from bringing both a civil rights action and a negligence action against a Tennessee municipality".[22] The judgment of both the District Court and the Sixth Circuit was erroneous in denying the Appellant the right, in her proposed amended complaint, to plead a wrongful death claim predicated on a different theory of state law negligence, based on previously undisclosed facts revealed by discovery. The proposed amended complaint, although advancing a different theory of negligence, is grounded on the same core facts as plead in the original complaint and thus complies with Rule 15(c)(2), and so the relation back doctrine applies.

By upholding the District Court's denial of Petitioner's motion to amend, the Sixth Circuit has essentially found that all claims asserted against the City of Memphis were effectively claims for violation of Xavier Johnson's constitutional rights and thus susceptible to immunity. But the Petitioner is not arguing that the dispatcher violated Xavier Johnson's

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[22] *Alexander v. Beale St. Blues Co.*, 108 F. Supp. 2d 934, 448 (W.D. Tenn. 1999).

federal civil rights. The City of Memphis should not be immunized against a wrongful death state law claim predicated on the negligence of the dispatcher, since the TGTLA does not list wrongful death as one of its exceptions, whether in subsection 2 or in any other of its subsections. What the TGTLA does not include as exceptions therefore cannot be precluded as a matter of law.

Petitioner is arguing wrongful death, not civil rights. In sum, the Sixth Circuit was right in precluding some civil rights, but wrong in precluding the wrongful death claim. Both Courts were right on the issue of civil rights. But both courts were wrong on the issue of wrongful death.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This Petition presents important questions relating to causes of action that advance both federal and state law claims. Should the dismissal of a federal claim be fatal to a state law claim? By granting certiorari, the Supreme Court will available itself with the opportunity to review a narrow decision with broad implications.

CONCLUSION

The Tennessee Supreme Court held that "section 29-20-205 of the GTLA removes immunity for injuries proximately caused by the negligent act or omission of a governmental employee except when the injury arises out of only those specified torts enumerated in subsection (2)."[23] Immunity of governmental entities for injuries resulting from the negligent acts or omissions of employees while in the scope of employment has been removed, with certain exceptions, by T.C.A. § 29-20-205. None of these exceptions apply to a wrongful death claim, predicated on negligence, under state law.

Applying this rule of law to the case at bar, Petitioner should have been allowed to reinstate her wrongful death claim, where section 29-20-205 of the GTLA removes immunity from the City of Memphis for the wrongful death of Xavier Johnson, proximately caused by the negligent act or omission of a governmental employee, i.e. the dispatcher, under new facts revealed by discovery, where the wrongful death did not arise out of any of the specified torts enumerated in subsection (2). The

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[23] *Limbaugh v. Coffee Medical Center*, 59 S.W.3d 73 at 84 (internal citation omitted).

District Court and the Sixth Circuit were simply wrong on this straightforward rule of law, as enunciated by the Tennessee Supreme Court. Rather than proving futile for failure to state a claim, Petitioner could have succeeded in stating a viable wrongful death claim pursuant to the TGTLA. She was wrongfully denied her wrongful death claim.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

S/ Walter Lee Bailey, Jr.
* Walter Lee Bailey, Jr.
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On the Petition

APPENDIX

SIXTH CIRCUIT COURT APPEALS FILING:

Opinion,
filed 08/24/10 ..... A1 - A24

WESTERN DISTRICT OF TENNESSEE FILINGS:

Judgment,
filed 12/31/08 ..... B1 - B1

Order of Dismissal,
filed 12/29/08 ..... C1 - C1

Order on Motions,
filed 08/21/08 ..... D1 - D12

Order on Motions,
filed 10/22/07 ..... E1 - E15

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 10a0259p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MONICA JOHNSON,
Plaintiff-Appellant,

v. No. 09-5046

CITY OF MEMPHIS; THE CITY OF MEMPHIS POLICE DIVISION; KENNETH ADAMS, individually and in his official capacity as an officer of the City of Memphis Police Department; MICHAEL DERRICK, as Administrator ad Litem of Melvin Rice, deceased, as said decedent acted in his individual capacity and as police officer of the City of Memphis,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 04-02374
Samuel H. Mays, Jr., District Judge.

Argued: January 12, 2010

Decided and Filed: August 24, 2010

Before: BATCHELDER, Chief Judge; SUTTON, Circuit Judge; WISEMAN, District Judge.*

COUNSEL

ARGUED: Walter Lee Bailey, Jr., WALTER BAILEY & ASSOCIATES, Memphis, Tennessee, for Appellant. Henry L. Klein, Sr., APPERSON CRUMP PLC, Memphis, Tennessee, for Appellees. **ON BRIEF**: Walter Lee Bailey, Jr., WALTER BAILEY & ASSOCIATES, Memphis, Tennessee, for Appellant. Henry L. Klein, Sr., APPERSON CRUMP PLC, Memphis, Tennessee, for Appellees.

OPINION

ALICE M. BATCHELDER, Chief Judge. Plaintiff-Appellant Monica Johnson ("Plaintiff"), widow of decedent Xavier Johnson ("Johnson"), appeals the district court's grant of summary judgment to Defendant-Appellee City of Memphis ("City") in her 42 U.S.C. § 1983 action arising out of a home entry by Memphis police officers that Johnson claims was in violation of the Fourth Amendment. Plaintiff also appeals the district

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*The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

court's denial of her motion to amend her complaint. For the reasons below we affirm.

I.

This matter arose out of the death of Xavier Johnson at his home in Memphis, Tennessee on April 22, 2004. On that night, police officers Kenneth Adams ("Adams") and Melvin Rice ("Rice") were both on duty, driving separate vehicles. At 9:11 P.M., they each received separate radio calls from their dispatcher to respond to a "911 hang call" from 619 Knightsbridge.[1] Rice was first on the scene and notified dispatch. He approached the front of the house and found the front door wide open. He advised dispatch of the open door, then announced that the police were present. Receiving no response, he entered with his weapon drawn. Adams arrived and saw Rice inside the doorway with his weapon drawn, so he drew his own weapon and followed Rice inside.

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[1]A 911 hang call occurs when a caller dials 9-1-1, hangs up before speaking with the operator, and the operator is unable to reach the caller when attempting to return the call.

At some point after the officers entered, a second call came in to dispatch with sufficient information to classify the call as a "mental consumer."

The parties contest the following sequence of events, though the dispute does not affect this appeal. According to the Defendants, Rice, who is now deceased, told Adams he saw someone moving down the corridor ahead of them. The officers agreed they should sweep the building to make sure that no one was hurt or in need of assistance. As they rounded the corner near the stairs, Johnson appeared. Rice inquired as to why Johnson did not respond to the officers' calls. Johnson did not answer, but instead jumped on Rice and a fight ensued. Rice pushed Johnson back into a wall, but Johnson lunged forward and grabbed Rice's gun hand. Rice yelled to Adams that Johnson was going for his gun. Adams shouted repeatedly at Johnson to get down, then fired twice at Johnson. After Adams fired, Johnson threw Rice into a wall and charged Adams. Adams retreated, yelled at Johnson to get down, and continued to fire, but Johnson reached him and hit him with enough force to throw Adams against a wall and knock him out briefly. When Adams came to his senses, Johnson was dead at his feet.

The officers later learned that Johnson was not ordinarily dangerous, but was bipolar and off his medication. Plaintiff had dialed 911 and then hung up in order to leave the house. She called again a few minutes later and informed the dispatcher of the medical situation. Sadly, this information did not reach the officers on the scene until it was too late.

Plaintiff claims that this account is not consistent with the evidence. She relies on evidence from the medical examiner that the wounds were not characteristic of close range fire, and the fact that one of the bullets found in Johnson's body came from Rice's weapon.

On May 18, 2004, Plaintiff filed a complaint asserting a number of claims against the officers, the City, and the Memphis Police Department. In September, 2004, the district court dismissed the claims against the police department, as well as Plaintiff's Fifth, Fourteenth, and Fifteenth Amendment claims against the City and the individual officers. On February 3, 2006, Plaintiff consented to the dismissal of most of her remaining claims, including those brought under state law. Plaintiff's only remaining claim was under the Fourth Amendment pursuant to 42 U.S.C. § 1983.

On August 15, 2007, Plaintiff filed a motion to amend her complaint based on dispatcher negligence and to reinstate the previously dismissed state law claims against the City. Defendants Adams and the City filed separate motions for summary judgment. The district court denied Plaintiff's motion to amend her complaint, denied Adams' motion for summary judgment, and granted the City's motion for summary judgment. Adams was later dismissed from the case with Plaintiff's consent. Plaintiff filed a motion to reconsider the denial of her motion to amend her complaint and the grant of the City's motion for summary judgment. The district court denied the motion and this timely appeal followed.

II.

Although this Court will "generally review a denial of a motion to alter or amend a judgment under Rule 59(e) for abuse of discretion, 'when the Rule 59(e) motion seeks review of a grant of summary judgment, . . . we apply a *de novo* standard of review.'" *Shelby County Health Care Corp. v. Majestic Star Casino, LLC*, 581 F.3d 355, 375

(6th Cir. 2009) (quoting *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 613 (6th Cir. 1998)).

"The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .'" *United States v. McClain*, 444 F.3d 556, 561 (6th Cir. 2006) (quoting US. Const. amend. IV) (alteration in original). The "'chief evil'" that the Fourth Amendment protects against is the "'physical entry of the home.'" *Payton v. New York*, 445 U.S. 573, 585 (1980) (quoting *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 US. 297, 313 (1972)). Searches of the home must be reasonable. *Thacker v. City of Columbus*, 328 F.3d 244, 252 (6th Cir. 2003). "This reasonableness requirement generally requires that police obtain a warrant based upon a judicial determination of probable cause prior to entering a home." *Id.* at 252. Warrantless entries into the home are "presumptively unreasonable." *Payton*, 445 U.S. at 586.

As "the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" there are several exceptions to the warrant requirement that are ultimately grounded in that standard. *See Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Lists of

recognized exceptions are inclusive rather than exclusive. "Exigent circumstances" are one such exception. *See Mincey v. Arizona*, 437 U.S. 385, 390 (1978) ("[W]arrants are generally required to search a person's home or his person unless the 'exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."); *Thacker*, 328 F.3d at 253. Exigent circumstances arise when an emergency situation demands immediate police action that excuses the need for a warrant. *United States v. Radka*, 904 F.2d 357, 361 (6th Cir. 1990) (citing *Welsh v. Wisconsin*, 466 US. 740, 750 (1984)). The government bears a "heavy burden" to demonstrate that such an exigency occurred. *Welsh*, 466 U.S. at 749–50. We have repeatedly recognized four situations that may rise to the level of exigency: "'(1) hot pursuit of a fleeing felon, (2) imminent destruction of evidence, (3) the need to prevent a suspect's escape, and (4) a risk of danger to the police or others.'" *Thacker*, 328 F.3d at 253 (quoting *United States v. Johnson*, 22 F.3d 674, 680 (6th Cir. 1994)).

The Supreme Court has also recognized that another "exigency obviating the requirement of a warrant is the need to assist persons who are

seriously injured or threatened with such injury." *Brigham City*, 547 U.S. at 403. In *Brigham City*, police responded to a call complaining of a loud party in the neighborhood. *Id*. at 400–01. Through the home's front window the police saw a fight breaking out in the kitchen, although the only injury they witnessed was a cut lip. *Id*. The police announced their presence, entered without consent or a warrant, prevented further violence, and made several arrests. Reversing the Utah Supreme Court, the United States Supreme Court held that the entry was objectively reasonable under the circumstances and constitutional under the emergency aid exception. *Id*. at 406–07. "[L]aw enforcement officers 'may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'" *Michigan v. Fisher*, 558 U.S. __, 130 S. Ct. 546, 548 (2009) (per curiam) (quoting *Brigham City*, 547 U.S. at 403).

"Officers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception." *Id*. at 549. Nor do officers need to wait for a potentially dangerous situation to escalate into public violence in order to intervene. *Id*. "'[T]he role of a peace officer

includes preventing violence and restoring order, not simply rendering first aid to casualties.'" *Id.* (quoting *Brigham City*, 547 U.S. at 406). The police's entry must be based on an objectively reasonable belief, given the information available at the time of entry, that a person within the house was "'in need of immediate aid.'" *Fisher*, 130 S. Ct. at 548 (quoting *Mincy*, 437 U.S. at 392).

The district court below relied on *United States v. Porter*, 288 F. Supp. 2d 716 (W.D. Va. 2003) in granting the City's motion for summary judgment. The police in *Porter* responded to a home security system alarm. *Id.* at 718. After receiving unconvincing explanations from several neighbors, the officers entered the house through the unlocked rear door to perform a protective sweep and determine if anyone was in need of assistance. *Id.* at 718–19. They found drugs and other contraband in the home, which the defendants later moved to suppress. The district court judge found that the police had an "objectively reasonable belief that 'an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within.'" *Id.* at 720, 722 (quoting *United States v. Moss*, 963 F.3d 673, 678 (4th Cir. 1992)). The district

court further noted that "there can be no doubt that the conduct of the officers in this instance was exactly the type of police work the community would expect, and possibly even demand." *Id.* at 721.

We have not previously decided whether a 911 call, hang or otherwise, is by itself sufficient to allow officers to enter a home without a warrant or consent. *Thacker*, 328 F.3d at 254 (noting cases from the Seventh and Eighth Circuits which have done so). In *Thacker*, police and paramedics responded to a 911 call reporting a stabbing or cutting injury. *Id.* at 249. Upon approaching the door the police saw broken glass, liquid stains on the wall, and the intoxicated, belligerent plaintiff bleeding profusely from his wrist. *Id.* The police entered over plaintiff's protests to secure the area for the paramedics and investigate whether anyone else needed assistance. *Id.* at 249–50. We upheld the district court's grant of summary judgment for the police defendants on this claim, holding that the police were justified in entering without a warrant due to the exigencies of the situation. *Id.* at 254–55. The panel noted, however, that it did not decide the question of whether the 911 call alone justified entry. *Id.* at 254 & n.2.

A 911 hang call with an unanswered return call from the dispatcher has been found to be sufficient to justify an officer's objectively reasonable belief that someone inside the residence is in immediate need of assistance. *Hanson v. Dane County*, 599 F. Supp. 2d 1046, 1053 (W.D. Wisc. 2009). In *Hanson*, the police received a 911 hang call and no one answered the return call. Police responded and entered the open garage without a warrant or consent. *Id.* at 1051. An investigation followed which resulted in the plaintiff's arrest. The plaintiff then sued the police for a § 1983 violation, claiming that the entry violated the Fourth Amendment. *Id.* at 1049–50. The district court granted summary judgment to the defendants, holding that "[t]he hang-up 911 call and the unanswered 911 return call made it reasonable for [the police officers] to believe that somebody inside required immediate assistance." *Id.* at 1053–54. The district court explained:

> In this case defendants did not have specific information about the call, but that did not diminish their need to investigate further. If anything, a 911 hang-up call with an unanswered return call from the 911 dispatcher

> may present even more reason to believe that someone inside the residence is in immediate need of assistance. An unanswered 911 return call suggests that someone in the residence is injured or otherwise incapacitated so as to be unable to answer the return call.

Id. at 1053 (citing *United States v. Elder*, 466 F.3d 1090, 1090 (7th Cir. 2006)).

We hold that the combination of a 911 hang call, an unanswered return call, and an open door with no response from within the residence is sufficient to satisfy the exigency requirement. The district court was correct in finding that the police were justified in entering the home to sweep for a person in need of immediate assistance under the emergency aid exception. The whole point of the 911 system is to provide people in need of emergency assistance an expeditious way to request it. Indeed, in many communities, the use of 911 for any purpose other than to report an emergency or to request emergency assistance is at least a misdemeanor offense. *See, e.g.*, Tenn. Code Ann. § 7-86-316(a) (LexisNexis Supp. 2009) ("A 911 call for a communication that is for some purpose other than to report an emergency or an

event that the person placing the call reasonably believes to be an emergency is a Class C misdemeanor."); Mich. Comp. Laws Ann. § 750.411a (West 2004) (punishing any false reporting of crimes, including through the 911 system); Ohio Rev. Code Ann. § 4931.49(D) (LexisNexis 2000) ("No person shall knowingly use the telephone number of the 9-1-1 system to report an emergency if he knows that no emergency exists."); Columbus, Ohio, Code of Ordinances § 2317.33 (2010) ("No person shall knowingly use the telephone number of the 9-1-1 system if he knows that no emergency exists or for non-emergency telephone calls" subject to a "misdemeanor of the first degree."); Cleveland, Ohio, Codified Ordinances § 605.071 (2009) (punishing any knowingly improper use of the 9-1-1 system as a misdemeanor of the first degree). Because a 911 call is by its nature an appeal for help in an emergency, the emergency aid exception best fits the attitude of police responding to a 911 call under the circumstances present here. Given the information he had, Adams had "'an objectively reasonable basis for believing' that 'a person within [the house] [was] in need of immediate aid.'" *Fisher*, 130 S.Ct. at 548 (internal citation omitted) (first alteration in original)

(quoting *Mincy*, 437 U.S. at 392). The officers' actions–announcing their presence and, after receiving no answer, entering in order to perform a cursory search for any endangered or injured persons–was an objectively reasonable response.

Plaintiff's cited cases are either distinguishable or not as persuasive as *Fisher, Porter, and Hanson*. *United States v. McClain* involved an investigation of a possible burglary, not an emergency aid situation. 444 F.3d 556, 564 (6th Cir. 2006) (requiring the government to show both probable cause and exigent circumstances to justify the warrantless search under the circumstances). In *Kerman v. City of New York*, the Second Circuit reversed the district court's ruling that an anonymous 911 call was a sufficient basis for the police's conclusion that exigent circumstances justified their entry without a warrant, but the Circuit Court relied entirely on the unreliable nature of the anonymous 911 call. 261 F.3d 229, 235-36 (2d Cir. 2001) (citing *Florida v. J.L.*, 529 U.S. 266 (2000)). No anonymous caller issues are presented here.

Plaintiff's reliance on *United States v. Meixner* is also misplaced. No. 00-20025, 2000 WL 1597736 (E.D. Mich. Oct. 26, 2000) (unpublished). In *Meixner*,

police responded to a 911 hang call where dispatch received no answer to its return call. *Id.* at *2. The police approached the house, where they were met at the door by the defendant. The defendant, intoxicated and irascible, opened the front door when the police knocked, but locked the storm door and refused them entrance. *Id.* at *3. Police saw a woman crying inside, who also told them to leave. *Id.* The police instead searched the house for anyone else in need of assistance, finding guns in the bedrooms. *Id.* at *3–4. The defendants filed a motion to suppress. The district court granted the motion, finding that the information available to the officers did not give rise to an objectively reasonable belief that exigent circumstances were present. *Id.* at *9–10. The district court gave great weight to its determination that the 911 hang call "conveyed no information. It was a hang-up call. There was no conversation at all, much less a report of an emergency." *Id.* at * 8. Because of this, the court found that the officers could only establish a subjective possibility of there being someone in need of immediate assistance, which is insufficient to justify entry based on exigent circumstances. *Id.* at *9–10.

Besides being greatly different from the factual circumstances before us here, where the officers did not speak with the occupants of the house and were not specifically refused entry, *Meixner*'s discussion of the 911 hang-up call is unpersuasive. 911 hang-up calls *do* convey information. They do not convey certainties, but certainties are not required. *See Hill v. California*, 401 U.S. 797, 804 (1971) ("[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. . . ."). 911 hang-ups inform the police that someone physically dialed 9-1-1, the dedicated emergency number, and either hung up or was disconnected before he or she could speak to the operator. An unanswered return call gives further information pointing to a probability, perhaps a high probability, that after the initial call was placed the caller or the phone has somehow been incapacitated. In some percentage of cases involving this set of facts, a person is in need of emergency assistance. Because the "ultimate touchstone" of the Fourth Amendment is reasonableness, certainty is not required.

We hold that it was objectively reasonable for the police in this situation, given the information

they had, to enter the house. We decline to establish a per se rule for all 911 hang calls and instead rest our decision on the specific facts of this case.[2]

III.

Plaintiff also appeals the denial of her motion to amend her complaint to add several state law claims. Plaintiff, however, appeals only the denial of permission to add her negligence claim based on the dispatcher's failure to inform the officers on the scene that Johnson was bipolar and off his medication. Plaintiff asserts that if this information had been properly acted upon, the officers would not have entered the house and a specialized unit would have been called in to resolve the situation without violence. The district court denied the

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[2]We specifically acknowledge the importance in these situations of the information the responding officers do *not* have, and note that further facts, such as a yard full of children and a parent's explanation that one had dialed 911 and hung up, would significantly alter the analysis. Here the absence of other information is critical to the reasonableness of the officers' entry.

amendment of this claim as futile because of the City's sovereign immunity. We agree and affirm.

Ordinarily we review for abuse of discretion the district court's denial of a motion to amend a pleading. *Bennettv. MIS Corp.*, 607 F.3d 1076, 1100 (6th Cir. 2010). When the district court denies the motion because the amendment would be futile, however, we review *de novo*. *Id*.

Tennessee codified its sovereign immunity law in the Tennessee Governmental Tort Liability Act ("TGTLA"). Tenn. Code Ann. §§ 29-20-101 *et seq*. Section 29-20-201 (a) provides that "[e]xcept as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result" from the exercise of government duties. "No party may bring a suit against 'the State' except 'in such manner and in such courts as the Legislature may by law direct.'" *Davidson v. Lewis Bros. Bakery*, 227 S.W.3d 17, 19 (Tenn. 2007) (quoting Tenn. Const. art. I, §17). "The State" includes municipalities. *Id*. (citation omitted). Tennessee courts will not find a waiver of sovereign immunity "unless there is a statute clearly and unmistakably disclosing an intent upon the part of the Legislature to permit such litigation." *Id*. (internal quotation marks and citation omitted). The

TGTLA removes immunity for "injury proximately caused by a negligent act or omission of any employee within the scope of his employment," but provides a list of exceptions to this removal of immunity. Tenn. Code Ann. §§ 29-20-205. Injuries that "arise[] out of . . . civil rights" are one such exception, that is, sovereign immunity continues to apply in those circumstances. *Id.* TGTLA's "civil rights" exception has been construed to include claims arising under 42 U.S.C. § 1983 and the United States Constitution. *See Hale v. Randolph*, 2004 U.S. Dist. Lexis 10173, *51 (E.D. Tenn. Jan. 30, 2004).

The district court found that "[a]ll of Plaintiff's claims against the City as an employer are in essence claims for violation of Johnson's constitutional rights." The district court found that the claim fell under the "civil rights" exception, and that the City is therefore immune under the TGTLA. This is consistent with the results reached by the majority of district courts addressing this question. *See, e.g., Campbell v. Anderson County*, 695 F. Supp. 2d 764, 778 (E.D. Tenn. 2010) ("These torts are alleged to have been committed solely in the context of the violation of [plaintiff's] civil rights–this is in essence a civil rights suit."); *Hale*, 2004 U.S. Dist. Lexis 10173 at *51. *But see McKenna v. City of*

Memphis, 544F. Supp. 415, 419 (W.D. Tenn. 1982) (finding that the TGTLA "only restores municipal immunity for civil rights claims as such, not those for negligence as a matter of common law"). Plaintiff's claim regarding the dispatcher's negligence arises out of the same circumstances giving rise to her civil rights claim under § 1983. It therefore falls within the exception listed in § 29-20-205, and the City retains its immunity. Plaintiff's reliance on *DePalma v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 40 F. App'x 187 (6th Cir. 2002) (unpublished) is misplaced because, despite the factual similarities, the opinion does not address the civil rights exception. *Id.* at 193.

Because the plain language of the TGTLA preserves immunity for suits claiming negligent injuries arising from civil rights violations, we find that the district court did not err in denying Plaintiff's motion to amend and reinstate her state law claim. Because we decide this issue under the TGTLA, we need not address the related abandonment, waiver, or statute of limitations arguments.

IV.

Accordingly, we **affirm** the district court's grant of summary judgment to Defendants and denial of Plaintiff's motion to amend her complaint.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-5046

MONICA JOHNSON,
Plaintiff - Appellant,

v.

CITY OF MEMPHIS; THE CITY OF MEMPHIS POLICE DIVISION; KENNETH ADAMS, individually and in his official capacity as an officer of the City of Memphis Police Department; MICHAEL DERRICK, as Administrator ad Litem of Melvin Rice, deceased, as said decedent acted in his individual capacity and as police officer of the City of Memphis,
Defendants - Appellees.

Before: BATCHELDER, Chief Judge; SUTTON, Circuit Judge; WISEMAN, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's grant of summary judgment to Defendants and its denial of Plaintiffs motion to amend her complaint are AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MONICA JOHNSON,
Plaintiff,

v. Cv. No. 04-2374-Ma

CITY OF MEMPHIS, et al.,
Defendants.

JUDGMENT

Decision by Court. This action came for consideration before the Court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, in accordance with the Order of Dismissal docketed December 29, 2008, this action is dismissed.

APPROVED:

S/ Samuel H. Mays Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

December 31, 2008
DATE

THOMAS M. GOULD
CLERK

S / Jean Lee
(By) DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

MONICA JOHNSON,
Plaintiff,

VS. NO. 04-2374-Ma

OFFICER KENNETH ADAMS,
Defendant.

ORDER OF DISMISSAL

On December 22, 2008, the parties filed a stipulation of dismissal of plaintiff's claims against the remaining defendant, Officer Kenneth Adams. It is therefore ORDERED that this case is DISMISSED.

Entered this 29th day of December, 2008.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

MONICA JOHNSON,
Plaintiff,

v. Case No. 04-2374

CITY OF MEMPHIS, ET AL.,
Defendants.

ORDER ON MOTIONS

This case arises from the shooting death of Xavier Johnson ("Johnson"). Monica Johnson ("Plaintiff") filed a complaint on May 18, 2004, bringing, inter alia, 42 D.S.C. § 1983 claims against the City of Memphis (the "City"), the City of Memphis Police Division, Officer Melvin Rice ("Rice"), and Officer Kenneth Adams ("Adams"). Rice and Adams were present at the scene when Xavier Johnson was shot. In an order entered September 1, 2004, the court dismissed Plaintiff's claims alleging violations of the Fifth, Fourteenth, and Fifteenth Amendments, Plaintiff's request for punitive damages against the City of Memphis, and the individual defendants acting in their official capacities. On February 3, 2006, a Consent

Order was entered dismissing Plaintiff's state law claims. The Plaintiff's remaining claim is under the Fourth Amendment pursuant to § 1983. On August 15, 2007, Plaintiff filed a motion to amend her complaint to reinstate her previously dismissed state law claims against the City of Memphis. The court denied that motion on October 22, 2007. Adams moved for summary judgment on August 15, 2007. On October 22, 2007, the court granted summary judgment on Plaintiff's unlawful entry claim, but denied summary judgment on her excessive force claim. On October 30, 2007, Adams filed a motion under Rule 59(e) to revise the prior order and grant Adams qualified immunity, to which Plaintiff responded on November 27, 2007. Plaintiff filed a motion for reconsideration of the court's decision not to allow reinstatement of Plaintiff's state law claims and to reopen the warrantless entry finding, to which the City responded on November 30, 2007.

The following facts are uncontested. On April 22, 2003, Adams and Rice were on duty. At 9:11 p.m., they received separate radio calls from the dispatcher to respond to a "9-1-1 hang call" at 619

Knightsbridge.[1] The dispatcher did not provide any additional information.

Rice arrived first and notified the dispatcher of his arrival. Rice discovered an open door, announced that he was a law enforcement officer, and entered with his gun drawn. Adams arrived and saw Rice inside with his gun drawn. Adams drew his gun and entered the residence as well.

Plaintiff contests the following facts. Rice stated to Adams that he had just seen someone run down the interior stairway. The officers continued to identify themselves and ask the person to come out. The officers received no response.

Adams told Rice that they should search the residence to make sure that no one was hurt. The officers moved down the hallway and stopped before moving around the corner. At that point, Johnson emerged, and Rice asked if he had heard them saying "police, come out."

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[1] A "9-1-1 hang call" occurs when a caller dials 9-1-1, hangs up before providing any information, and the operator is unable to reach the caller after attempting to return the call.

Johnson began to grapple with Rice. Rice shoved Johnson away and into a wall. Johnson then grabbed Rice's gun hand. Rice struggled with Johnson while holding his gun. Rice began to yell, "he's going for my gun!" Adams instructed Johnson to get down. Johnson did not comply with Adams' instructions. Adams fired one shot at Johnson when he obtained a clear field of fire. Johnson continued to struggle with Rice. Adams fired another shot, which he saw strike Johnson.

Johnson threw Rice out of the way and charged Adams. Adams began stepping backwards to maintain distance while Johnson continued to run towards Adams. Adams fired repeatedly. Johnson reached Adams and hit him in the chest with his fist, delivering enough force to knock Adams against a kitchen counter and into a wall. Adams claims that the blow knocked him unconscious and that, when he regained consciousness, Johnson was dead at his feet.

Plaintiff disputes Adams' version of the events. Plaintiff cites the medical examiner's report that each of Johnson's gunshot wounds was unaccompanied by stipple or soot, which ordinarily occurs when a firearm is discharged at close

range. One of the bullets lodged inside Johnson came from Rice's firearm.

II. Jurisdiction

Under 28 U.S.C. § 1331, this court has original jurisdiction to adjudicate federal claims. The court has supplemental jurisdiction under 28 U.S.C. § 1367(a) to adjudicate state law claims arising from the same nucleus of operative facts as the federal claims.

III. Standard of review

Although Plaintiff has not stated what rule she proceeds under, the court considers both motions under the Rule 59(e) standard. In the Sixth Circuit, a Rule 59(e) motion "may be granted if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice." GenCorp, Inc. v. Am. Int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999) (citations omitted). Such a motion "may not be used to relitigate old matters, or to raise arguments, or present evidence that could have been raised prior to the entry of judgment." 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995). Parties may not use a motion for reconsideration to raise new legal arguments that could have been raised before a

judgment was issued. Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998) (stating that a Rule 59(e) motion "is not an opportunity to re-argue a case"). Reconsideration motions also may not be used to argue a new legal theory. Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC, 477 F.3d 383, at 395 (6th Cir. 2007) (citing FDIC v. World Univ., Inc., 978 F.2d 10, 16 (1st Cir. 1992)). Courts should use their "informed discretion" in deciding whether to grant or deny a Rule 59(e) motion. See Huff v. Metro. Life Ins. Co., 675 F.2d 119, 122 (6th Cir. 1982).

IV. Analysis

The court addresses the following issues: (A) Plaintiff's motion to reconsider the warrantless entry ruling, (B) Plaintiff's motion to reconsider reinstating state law claims, and (C) Adams' motion to reconsider qualified immunity.

A. Entry

Plaintiff identifies no new evidence, intervening change in law, or manifest injustice, and never argues that clear error requires reconsideration and reversal of the Order. The words "clear error" never appear in Plaintiff's memorandum. Plaintiff never explains why her arguments about warrantless entry could not have

been raised before. The court considers them briefly.

Plaintiff argues that the court erred in ruling on the propriety of a warrantless entry in response to a 9-1-1 hang-up call. In support, Plaintiff cites United States v. Cohen, 418 F.3d 896 (6th ir. 2007). Cohen found that a 9-1-1 hang-up call was an insufficient indicium of criminal activity to stop a suspect. Plaintiff misreads this court's ruling. The court found that a cursory sweep was justified. "Adams and Rice's justification did not authorize rummaging through Johnson's personal belongings, but only sweeping through the house to see if anyone were in danger or injured." (Order, 13.) A 9-1-1 hang-up call does not authorize police to search for contraband or to linger inside a dwelling. The court narrowly held that emergency responders could pass through an open door to make sure no one was in danger.

Plaintiff also cites United States v. Meixner, 2000 WL 1597736, *8 (E.D. Mich. 2000). In Meixner the officers summoned by a 9-1-1 hang-up call searched the defendant's house for weapons after being refused entry. The court did not rule on this vastly different factual scenario. Rice and Adams were not running drug dogs through the house or

rifling through sofa cushions. They were not refused entry. The officers' limited justification extended only to entering and ensuring that no one was facing an emergency. Plaintiff's argument that a 9-1-1 hang-up call should be treated as an unverified anonymous tip for criminal purposes misses the point. A 9-1-1 hang-up call does not grant authority to rush in and arrest anyone on the premises. Plaintiff asks the court to declare that it is unconstitutional for emergency responders to pass through an open door and check to see if anyone needs help. Plaintiff has not shown that the court made a clear error of law. GenCorp, Inc. v. Am. Int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999). Plaintiff's motion to reconsider the warrantless entry finding is DENIED.

B. Reinstating state law claims

Plaintiff does not identify new evidence, intervening change in law, or manifest injustice, or argue that clear error requires reconsideration and reversal of the court's order on state law claims. Plaintiff never explains why her arguments about the meaning of the civil rights exception could not have been raised before. The court considers them briefly.

Plaintiff again moves the court to allow her to reinstate her previously waived state law claims. Plaintiff argues that the court erred in ruling that a claim against the dispatcher for simple negligence stems from a civil rights violation and that the City is immune under the Tennessee Governmental Tort Liability Act ("TGTLA"). Tenn. Code Ann. §§ 29-20-101 et seq. The court stated that "[a]ll of Plaintiff's claims against the City as an employer are in essence claims for violation of Johnson's constitutional rights. The civil rights exception provides the City with immunity from separate claims for negligence under state law as an employer." (Order, 8-9.)

Plaintiff cites DePalma v. Metropolitan Government of Nashville, 40 Fed. Appx. 187 (6th Cir. 2002), for the proposition that the civil rights exception should not bar her state law claims. DePalma, an unpublished opinion, never addresses the civil rights exception. The opinion does not show that the court made a clear error of law in ruling that Plaintiff's state law claims fall within the civil rights exception. GenCorp, Inc. v. Am. Int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999).

Although Plaintiff argues that the court's interpretation of the civil rights exception is

erroneous, Plaintiff never offers an alternative construction. The TGTLA waives sovereign immunity for negligence claims but excepts injuries arising out of civil rights from its general waiver of immunity. T.C.A. 29-20-205 (2).

The court's construction of the civil rights exception recognizes that sovereign immunity does not apply for ordinary negligence resulting in ordinary injuries. Thus, when a police cruiser runs over a mailbox, the TGTLA will not bar an action seeking damages because the injury does not arise out of a civil rights violation. Where, as here, however, the Complaint is in essence for violation of civil rights, the TGTLA precludes governmental liability. This construction gives meaning to the civil rights exception. Plaintiff cannot show that the court's decision was clearly erroneous without providing an alternative construction making sense of the provision.

Plaintiff's motion to reconsider the court's denial of her motion to reinstate previously waived state law claims is DENIED.

B. Adams' motion to reconsider

Adams does not identify new evidence, intervening change in law, or manifest injustice, or argue that clear error requires reconsideration and

reversal. Adams does not argue that the court must grant summary judgment on qualified immunity after reading the facts in the light most favorable to the Plaintiff. Adams contends that the physical evidence Plaintiff submitted was incomplete. Adams does not identify any reason for his failure to present the court with that evidence at an earlier time. The court declined to grant qualified immunity to Adams, ruling that Adams' credibility was an issue for the jury and that the court could not decide it.

Adams contends that the lack of stippling is consistent with his account and identifies three possibly mistaken assumptions. Those assumptions are that (1) Adams made a statement about Rice's firearm, (2) the gun would only have discharged during a struggle, and (3) if the gun did not discharge in close quarters, no struggle occurred. The first assumption is not relevant for purposes of qualified immunity. That Adams' account is consistent with the physical evidence is relevant for the jury's determination; however, alternate versions of the event might also be consistent with the physical evidence. The court cannot make the credibility determination that would be required to grant qualified immunity. See Adams v. Metiva, 31

F.3d 375, 387 (6th Cir. 1994) (stating that "[i]t is the province of the jury, not the court, to decide on the credibility of the defendant's account of the need for force"). Adams has not shown that the court made a clear error in refusing to grant summary judgment. GenCorp, Inc. v. Am. Int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999). Adams' motion for reconsideration is DENIED.

V. Conclusion

For the foregoing reasons, Plaintiff's motion for reconsideration is DENIED. Adams' motion for reconsideration is DENIED.

So ordered this 21st day of August, 2008

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

MONICA JOHNSON, Surviving Spouse, on her own behalf, on behalf of XAVIER J. JOHNSON, JR., a minor as mother, next friend and natural guardian, and as next kin of XAVIER JOHNSON, deceased

Plaintiff,

v. Case No. 04-2374

CITY OF MEMPHIS, THE CITY OF MEMPHIS POLICE DIVISION, and KENNETH ADAMS, individually and in his official capacity,

Defendants.

ORDER ON MOTIONS

This case arises from the shooting death of Xavier Johnson ("Johnson"). Monica Johnson ("Plaintiff") filed a complaint on May 18, 2004, bringing 42 D.S.C. § 1983 claims against the City of Memphis (the "City"), the City of Memphis Police Division, Officer Melvin Rice ("Rice"), and Officer Kenneth Adams ("Adams"). Rice and Adams were present at the scene when Xavier Johnson was shot. In an order entered September 1, 2004, the court dismissed Plaintiff's claims alleging violations

of the Fifth, Fourteenth, and Fifteenth Amendments, Plaintiff's request for punitive damages against the City of Memphis, and the individual defendants acting in their official capacities. On February 3, 2006, a Consent Order was entered dismissing Plaintiff's state law claims. The Plaintiff's remaining claim is under the Fourth Amendment pursuant to § 1983. On August 15, 2007, Plaintiff filed a motion to amend her complaint to reinstate previously dismissed state law claims against the City of Memphis. On September 7, 2007, the City responded. On August 15, 2007, Adams filed a motion for summary judgment, to which Plaintiff responded on October 4, 2007. On August 31, 2007, the City filed a motion for summary judgment, to which Plaintiff responded on October 4, 2007.

I. Background

The following facts are uncontested. On April 22, 2003, Adams and Rice were on duty. At 9:11 p.m., they received separate radio calls from the dispatcher to respond to a "9-1-1 hang call" at 619

Knightsbridge.[1] The dispatcher did not provide any additional information.

Rice arrived first and notified the dispatcher of his arrival. Rice discovered an open door, announced that he was a law enforcement officer, and entered with his gun drawn. Adams arrived and saw Rice inside with his gun drawn. Adams drew his gun and entered the residence as well.

Plaintiff contests the following facts. Rice stated to Adams that he had just seen someone run down the interior stairway. The officers continued to identify themselves and ask the person to come out. The officers received no response.

Adams told Rice that they should search the residence to make sure that no one was hurt. The officers moved down the hallway and stopped before moving around the corner. At that point, Johnson emerged, and Rice asked if he had heard them saying "police, come out."

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[1]A "9-1-1 hang call" occurs when a caller dials 9-1-1, hangs up before providing any information, and the operator is unable to reach the caller after attempting to return the call.

Johnson began to grapple with Rice. Rice shoved Johnson away and into a wall. Johnson then grabbed Rice's gun hand. Rice struggled with Johnson while holding his gun. Rice began to yell, "he's going for my gun!" Adams instructed Johnson to get down. Johnson did not comply with Adams' instructions.

Adams fired one shot at Johnson when he obtained a clear field of fire. Johnson continued to struggle with Rice. Adams fired another shot, which he saw strike Johnson.

Johnson threw Rice out of the way and charged Adams. Adams began stepping backwards to maintain distance while Johnson continued to run towards Adams. Adams fired repeatedly. Johnson reached Adams and hit him in the chest with his fist delivering enough force to knock Adams against a kitchen counter and into a wall. Adams claims that the blow knocked him unconscious and that, when he regained consciousness, Johnson was dead at his feet.

Plaintiff disputes Adams' version of the events. Plaintiff cites the medical examiner's report that each of Johnson's gunshot wounds was unaccompanied by stipple or soot, which ordinarily occurs when a firearm is discharged at close

range. One of the bullets lodged inside Johnson came from Rice's firearm.

II. Jurisdiction

Under 28 U.S.C. § 1331, this court has original jurisdiction to adjudicate federal claims. The court has supplemental jurisdiction under 28 U.S.C. § 1367(a) to adjudicate state law claims arising from the same nucleus of operative facts as the federal claims.

III. Summary judgment standard

The party moving for summary judgment "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986). The moving party can meet this burden by pointing out to the court that the respondent, having had sufficient opportunity for discovery, have no evidence to support an essential element of her case. See Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989) .

When confronted with a properly supported motion for summary judgment, the respondent must set forth specific facts showing that there is a

genuine issue for trial. A genuine issue for trial exists if the evidence is such that a reasonable jury could return a verdict for the summary judgment motion opponent. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Plaintiff must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). She may not oppose a properly supported summary judgment motion by mere reliance on the pleadings. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Instead, the nonmovant must present "concrete evidence supporting . . . [her] claims." Cloverdale Equip. Co. v. Simon Aerials, Inc., 869 F.2d 934, 937 (6th Cir. 1989). The district court does not have the duty to search the record for such evidence. See InterRoyal Corp. v. Sponseller, 889 F.2d 108, 110-11 (6th Cir. 1989). The Nonmovant has the duty to point out specific evidence in the record that would be sufficient to justify a jury decision in her favor. See id.

IV. Analysis

Before the court are three motions: Plaintiff's motion to amend her complaint, the City's motion for summary judgment, and Adams' motion for summary judgment.

A. Motion to amend

Plaintiff seeks to plead a negligence theory premised on the dispatcher's failure to communicate properly and to reinstate state law claims that are barred by the statute of limitations.

1. Alternative Negligence Theory

Plaintiff seeks to amend the complaint and allege that the dispatcher was negligently trained and failed to communicate quickly after a second 9-1-1 call. The City argues that the amendment is futile because Plaintiff has already alleged that the City inadequately trains, supervises, and disciplines its officers as a matter of custom. The City does not object to the sufficiency of Plaintiff's Complaint to support recovery under a theory of liability premised on the training of the dispatcher. There is no need to amend the complaint to state a claim premised on failures by the dispatcher. Garci v. City of Chicago, 24 F.3d 966, 970 (7th Cir. 1994) (declining to allow amendment when amendment fails to state a new claim) .

2. State law claims

Plaintiff seeks to reinstate state law claims against the City, although the statute of limitations has run. Plaintiff does not seek to allege state law violations against Adams, and Adams does not

oppose Plaintiff's motion. Plaintiff's motion to amend her Complaint must be denied because amendment would be futile, even if the statute of limitations had not run.

Under Tennessee common law, the state enjoys sovereign immunity from suit. Davidson v. Lewis Bros. Bakery, 227 S.W.3d 17, 19 (Tenn. Sup. Ct. 2007). Tennessee courts have extended the state's sovereign immunity to local municipalities. Id. (citing Metro. Gov't of Nashville & Davidson County v. Allen, 415 S.W.2d 632, 635 (Tenn. Sup. Ct. 1967)). Sovereign immunity is codified by the Tennessee Governmental Tort Liability Act ("TGTLA"), which sets forth the areas in which Tennessee waives its immunity. Tenn. Code Ann. §§ 29-20-101 et seq. The TGTLA excepts civil rights violations from its general waiver of negligence liability. TGTLA § 29-20-205(2). Governmental entities retain immunity when a claim rooted in the conduct of employees is "in essence a claim for negligent violation of civil rights," Brooks v. Sevier County, 279 F. Supp. 2d 954, 960 (E.D. Tenn. 2003). When a plaintiff "asserts his state law claims in the context of a civil rights case, his alleged injuries arise out of 'civil rights' [violations] and the governmental entities are entitled to immunity under the TGTLA."

Bettis v. Pearson, 2007 WL 2426404, *11 (E.D. Tenn. 2007). The TGTLA also specifically retains sovereign immunity for the exercise of discretionary functions. TGTLA § 29-20-205(1). Tennessee law provides that the question of "whether and how to discipline combative employees is indeed a policy determination that cannot give rise to liability." Limbaugh v. Coffee Medical Center, 59 S.W.3d 73, 85 (Tenn. Sup. Ct. 2001).

The City contends that it retains sovereign immunity from state law claims because Plaintiff has filed a civil rights claim and because any claim against the City for its own negligence in failing to train, screen, monitor, supervise, control, or discipline the officers falls within the discretionary function exemption.

Plaintiff's proposed Complaint fails to allege that the City has waived its immunity, even if the claims were not barred by the statute of limitations. Plaintiff has not argued that the City is not immune.

The City enjoys sovereign immunity from Plaintiff's state law claims. In Hale v. Randolph, 2004 U.S. Dist. LEXIS 10173, *51 (E.D. Tenn. Jan. 30, 2004), the court construed the "civil rights" exception under § 29-20-205(2) to mean "claims arising under the federal civil rights laws, e.g. 42

U.S.C. § 1983, and the United States Constitution." Plaintiff has sufficiently alleged unreasonable search and seizure and use of excessive force in violation of the Fourth Amendment to trigger the civil rights exception. All of Plaintiff's claims against the City as an employer are in essence claims for violation of Johnson's constitutional rights. The civil rights exception provides the City with immunity from separate claims for negligence under state law as an employer. The City is also immune from suit for the intentional or reckless acts of its employees, even if the City negligently disciplined them. Plaintiff's claims against the City for its own negligence fall within the discretionary function exemption, and the city is immune under state law for exercising oversight poorly. Limbaugh v. Coffee Medical Center, 59 S.W.3d 73, 85 (Tenn. Sup. Ct. 2001) (stating, for example, that "questions of whether and how to discipline combative employees is indeed a policy determination that cannot give rise to tort liability"). Plaintiff's state law claims, addressing the City's supervisory and training policies, fall within the discretionary function exemption. Plaintiff's motion to amend her complaint is DENIED.

B. Adams' motion for summary judgment

Adams contends that he is entitled to qualified immunity for entering without a warrant and for shooting Johnson. Plaintiff's sole argument in opposition to Adams' motion for summary judgment is that Adams is not entitled to qualified immunity on the excessive force claim.

Construing the facts in a manner most favorable to Plaintiff, the court cannot conclude that Adams is entitled to qualified immunity. Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986). Substantial physical evidence conflicts with Adams' account of the events. Plaintiff claims that Johnson did not threaten Adams or Rice in the manner Adams alleges. A bullet from Rice's firearm was found inside Johnson. (Report of Heath Barker, Forensic Scientist, at pg. 2.) Although Adams and Rice stated they were unaware that Rice's firearm had been discharged, the lack of stippling around that wound may indicate that Rice and Johnson were not grappling. It seems likely that Rice and Johnson would have been in close quarters if they were wrestling over Rice's firearm. If they were not grappling in close quarters over a firearm, the reasonableness of Adams' use of force becomes

suspect. Johnson and Rice are both deceased. Adams' credibility is extremely important and a matter for a jury to decide. Adams v. Metiva, 31 F.3d 375, 387 (6th Cir. 1994) (stating that "[i]t is the province of the jury, not the court, to decide on the credibility of the defendant's account of the need for force") . Plaintiff has submitted sufficient evidence to controvert Adams' account. Adams' motion for summary judgment on qualified immunity for entering the residence is GRANTED. Adams' motion for summary judgment on the excessive force claim is DENIED.

C. The City's motion for Summary Judgment

On August 31, 2007, the City filed a motion for summary judgment, to which Plaintiff responded on October 4, 2007. The City is a municipality. To sustain a 42 U.S.C. § 1983 claim against a municipality, Plaintiff must show that the violation of Johnson's rights was a result of an illegal policy or custom. Monell v. New York City Dept. Of Soc. Servs., 436 U.S. 658, 690 n.55 (1978).

The City moves for summary judgment on three issues: (1) whether the City has a custom of inadequate training, supervision, and discipline of officers who are involved in crisis situations with mentally unstable individuals, (2) whether the City

has demonstrated deliberate indifference to calls involving mentally unstable persons such that the City's indifference causes delays and failures, and (3) whether the City has adequate response procedures using the Crisis Intervention Team. Plaintiff appears to concede that the City's policies as to these three issues are reasonable, stating that "since discovery, these particular issues were no longer pursued." (Pl.'s Resp. to Mot. For Summ. J. by City, at pg. 1.) The court finds that the City has established that its policies and procedures are adequate on these three issues.

Plaintiff's "main contention" (Id.) for municipal liability is that the City has a policy of making warrantless entries into private residences in response to 9-1-1 hang-up calls when officers find an unlocked or open door where the call originated. Plaintiff maintains that the City's policy is unconstitutional.

Plaintiff acknowledges that exigent circumstances may justify abandoning the warrant requirement. The Sixth Circuit recognizes that no warrant is needed during hot pursuit of a fleeing suspect, to prevent imminent destruction of evidence, to prevent a suspect's escape, and when there is a risk of danger to police or others.

United States v. Williams, 354 F.3d 497, 503 (6th Cir. 2003). Plaintiff does not mention the emergency search exception. Under that exception, police officers may "make both warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." 68 Am Jur 2d Searches and Seizures § 134. The dispatcher had received a 9-1-1 call, and the caller had hung up before imparting any information. Subsequent attempts to contact the caller had failed. Adams and Rice arrived and found an open door. No other information was available.

Adams and Rice had reasonable cause to believe that someone inside might be in immediate danger. In United States v. Porter, 288 F.Supp.2d 716 (W.D. Va. 2003), the court found that police officers were justified in entering a home to conduct a limited cursory sweep when a burglar alarm had been triggered, although neighbors gave a reasonable explanation for the alarm's activation. The court went further and stated that this type of police work might ordinarily be expected or demanded by the community. Porter, 288 F.Supp 2d at 721.

Adams and Rice's justification did not authorize rummaging through Johnson's personal

belongings, but only sweeping through the house to see if anyone were in danger or injured. Many scenarios might prompt a 9-1-1 hang call. The caller could have had a heart attack, been held down by a burglar, or have passed out from an allergic reaction after dialing. The officers had no way to know what had occurred and had a reasonable basis to believe that there was an emergency. Dialing 9-1-1 summons emergency responders; a policy or custom of the City allowing the police to investigate a possible emergency by passing through an open door is constitutional.

V. Conclusion

Plaintiff's motion to amend is DENIED. Adams' motion for summary judgment is DENIED in part and GRANTED in part. The City's motion for summary judgment is GRANTED.

So ordered this 22d day of October 2007

/s Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

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(2)

No. 10-696

Supreme Court, U.S.
FILED
DEC 29 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MONICA JOHNSON,

Petitioner,

v.

CITY OF MEMPHIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Sixth Circuit Court of Appeals correctly held that the Petitioner was not entitled to amend her Complaint to add state law claims?

II. Whether the Sixth Circuit Court of Appeals' ruling implicates an important federal question that has not been settled by this Court?

III. Whether there are other compelling reasons to deny Petitioner's Motion to Amend her state court claims, in addition to the ruling by the Sixth Circuit Court of Appeals?

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STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1257(a), which confers jurisdiction on the court by Writ of *Certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

I. Facts Relevant To The Petition

On April 22, 2004, a "911" call was placed to the Memphis Police Department Communications Section by Petitioner, which was classified as a "hang call." The dispatcher contacted officers in the field advising a "hang call" had been received. Thereafter, a second call came in, at which time enough information was taken to classify the call as involving a "mental case" or "mental consumer." In the meantime, between calls, officers were dispatched to the scene and arrived to the home before the second call came in. Until the second call was received, the first call was considered a "hang call" with no information.

On the date in question, Memphis Police Officer Kenneth Adams and his partner at the time got a call from the dispatcher that there was a 911 hang-up call at 6119 Knights Bridge in an apartment complex. The officers had no further information other than the fact there was a call and they were being sent over to check out what was taking place.

Officer Melvin Rice, who also received the information, was riding in a separate car and arrived at the scene before Officer Adams. When Officer Adams arrived at the scene, Officer Rice acknowledged that he had made the scene and the patio door was open. Upon Officer Adams' arrival, he saw his partner standing in the middle of the house and he went inside. Upon entering, Officer Adams inquired as to what was going on and they decided to do a search of the apartment to make sure no one was hurt. As they started down the hallway, Officer Rice thought he saw a person come down the stairs and all of a sudden, Petitioner's husband, Xavier Johnson appeared before them. At that point, Mr. Johnson immediately jumped on Officer Rice. Once he grabbed Officer Rice, he had him in a "bear hug," at which time Officer Rice pushed him off with his forearm. Mr. Johnson hit the wall and as he came off the wall, he grabbed Officer Rice and they started struggling over Officer Rice's weapon. Officer Rice called out to Officer Adams that Mr. Johnson had gotten his gun. As the struggle continued, Officer Adams continuously hollered to Mr. Johnson to get down, and when Mr. Johnson refused, Officer Adams had a clear shot and fired one shot at him. After the first shot, Mr. Johnson continued to struggle and Officer Adams shot him again. After the second shot, Mr. Johnson moved Officer Rice out of the way and kept charging towards Officer Adams, who took a couple of steps back and kept hollering to Mr. Johnson to get down. Mr. Johnson kept charging toward him and Officer Adams fired additional shots. At that time, Mr. Johnson

lunged toward him and knocked him into the wall and into the patio door. Mr. Johnson fell to the floor at the feet of Officer Adams. Contact was made with City's Communications Section that a shooting had occurred. When paramedics arrived at the scene, Mr. Johnson was pronounced dead.

The officers later learned that Mr. Johnson was not ordinarily dangerous, but was bi-polar and was off his medication. Unfortunately, the information in Petitioner's second call did not reach the officers until it was too late.

II. Procedural History and Opinions Below

The original complaint for civil rights violation and violation of wrongful death was filed on May 18, 2004, by Petitioner on her own behalf and on behalf of her minor son. Following the filing of a Motion to Dismiss on behalf of Respondent City of Memphis (the "City"), the District Court entered an order granting in part the City's motion to dismiss Petitioner's claims against the Memphis Police Division. The court dismissed the claims alleging violations of Fifth, Fourteenth and Fifteenth Amendments, the request for punitive damages, and claims against the individual Defendants acting in their official capacities.

On December 1, 2004, Petitioner filed an amendment to the damages portion of the Complaint, and the City filed a second Motion to Dismiss reiterating that the City was not liable for punitive damages. An

order was again entered dismissing Petitioner's claim for punitive damages.

Thereafter, Petitioner filed a second Amended Complaint for civil rights violations and wrongful death regarding the failure of the City to properly utilize its Crisis Intervention Team at the time of the incident in question which it alleged ultimately resulted in the shooting death of Petitioner's husband. The City filed a Motion to Dismiss the second Amended Complaint and on February 6, 2006, a Consent Order was entered dismissing certain claims in Petitioner's second amended complaint, namely, claims pursuant to the Fifth and Fourteenth Amendments to the Constitution, claims pursuant to state law and the additional claims for punitive damages.

On August 15, 2007, Petitioner filed another Motion to Amend seeking a reinstatement of previously dismissed state law claims, alleging failure of the Memphis Police Department to adequately train its officers to respond to "911 hang-up calls."

On August 31, 2007, the City filed its Motion for Summary Judgment and memorandum in support thereof. Thereafter, an order was entered by the Court denying Petitioner's motion to reinstate the state court claims and granting the City's Motion for Summary Judgment.

On November 27, 2007, Petitioner filed a Motion for Reconsideration, which was denied and Petitioner filed a notice of appeal to the Sixth Circuit Court of Appeals.

On August 24, 2010, the Sixth Circuit Court of Appeals affirmed the District Court's ruling by concluding, among other things, that the District Court committed no error in denying Petitioner's Motion to Amend seeking reinstatement of her state court claims because the plain language of the Tennessee Governmental Tort Liability Act (TGTLA) preserves immunity for suits claiming negligent injuries arising out of civil rights violations. This Writ of *Certiorari* followed.

ARGUMENT

I. The District Court And The Court Of Appeals Correctly Found That Petitioner Was Not Entitled To Amend Her Complaint Based Upon Newly Discovered Evidence.

The essence of Petitioner's position is that the District Court and the Court of Appeals erred in finding that the Tennessee Governmental Tort Liability Act (TGTLA) was controlling since she had a separate independent cause of action pursuant to the Tennessee Wrongful Death Act.

The TGTLA is codified at Tenn. Code Ann. § 29-20-101, *et seq.* The specific section involved here is Tenn. Code Ann. § 29-20-205(2), which states, in pertinent part, as follows:

> Immunity from suit of all governmental entities is removed for injury proximately

> caused by a negligent act or omission or any employee within the scope of his employment, except if the injury arises out of:
>
> . . . .
>
> (2) false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights; . . .

Petitioner bases her right to proceed upon the Tennessee Wrongful Death Act which is found at Tenn. Code Ann. § 20-5-113, and states as follows:

> Where a person's death is caused by the wrongful act, fault, or omission of another, and suit is brought for damages, as provided for by §§ 20-5-106 and 20-5-107, the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.

The Petitioner's reliance upon the Tennessee Wrongful Death Act as conferring a separate cause of action under the facts of this case is misplaced. An action against a governmental entity, whether it is a claim for negligence pursuant to the Tennessee

Wrongful Death Act or otherwise, must be brought under the TGTLA. This is established by the Tennessee Supreme Court in *Doyle v. Frost*, 49 S.W.3d 853 (Tenn. 2001), wherein the court stated pertinently, as follows:

> The doctrine of sovereign immunity historically has been recognized as prohibiting suits against the State and governmental entities. *See Hawks v. City of Westmoreland*, 960 S.W.2d 10, 14 (Tenn. 1947); *see also* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv.L.Rev. 1 (1963). The doctrine has been acknowledged in Tennessee's common law for over a century and provides that "suit may not be brought against a governmental entity unless that governmental entity has consented to be sued." *Hawks,* 960 S.W.2d at 14 (citing *Lucius v. City of Memphis*, 925 S.W.2d 522, 525 (Tenn. 1996)); *see also* Tenn. Const. Art. I, § 17 ("Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct."). Since 1973, claims against counties, municipalities, and other local governmental agencies have been governed by the GTLA. *See generally* Tenn.Code Ann. §§ 29-20-101 to 407 (2000).

Doyle v. Frost, 49 S.W.3d 853, 857 (Tenn. 2001). This doctrine is reinforced by the Tennessee Supreme Court in *Lynn v. City of Jackson,* 63 S.W.3d 332, 337 (Tenn. 2001). *Lynn* is particularly significant since it deals with a claim against the City of Jackson,

Tennessee pursuant to the Tennessee Wrongful Death Statute. The court discusses the Wrongful Death Statute and finds that its purpose is to provide for the continued existence and passing of the right of action of the deceased and not for any new, independent causes of action in survivors. *Id.* at 335. Basically, what the statute does is to provide for elements of damages consistent with the theory of the survival of the right of an action of the deceased. *Id.* at 335-36.

Tenn. Code Ann. § 29-20-201 confirms that the exclusive cause of action for wrongful death is pursuant to the TGTLA. It provides in part:

> (a) Except as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary.
>
> (b)(1) The general assembly finds and declares that the services of governmental entity boards, commissions, authorities and other governing agencies are critical to the efficient conduct and management of the public affairs of the citizens of this state. Complete and absolute immunity is required for the free exercise and discharge of the duties of such boards, commissions, authorities and other governing agencies. Members of boards, commissions, authorities, and other governing agencies must be permitted to

> operate without concern for the possibility of litigation arising from the faithful discharge of their duties.
>
> . . . .

It should be noted that under the "Definitions" section of the TGTLA found at Tenn. Code Ann. § 29-20-102(4) injury is defined as follows:

> "Injury" means *death*, injury to a person, damage to or loss of property or any other injury that one may suffer to one's person, or estate, that would be actionable if inflicted by a private person or such person's agent. (Emphasis supplied by writer).

Since injury includes death, it is conclusive that any death action must be brought pursuant to the TGTLA. Furthermore, any claim for damages must be brought in strict compliance with the terms of the TGTLA. Tenn. Code Ann. § 29-20-201(c). In *Ezell v. Cockrell*, 902 S.W.2d 394 (Tenn. 1995), the Court held:

> The limited waiver of governmental immunity provided for in the Act is in clear derogation of the common law. Generally, statutes in derogation of the common law are to be strictly construed and confined to their express terms, and that rule of construction has been expressly incorporated into the Act. . . .

Id. at 399.

In such actions against governmental entities, the Tennessee courts have clearly stated that the

Tennessee Wrongful Death Act is subsumed by the TGTLA, which affords immunity to municipalities.

II. The Ruling Of The Sixth Circuit Court Of Appeals Does Not Implicate An Important Federal Question Which Has Not Been Settled By This Court.

The jurisdiction of the United States Supreme Court is governed by Supreme Court Rule 10. Pursuant to the applicable rule, review on a Writ of *Certiorari* is not a matter of right, but of judicial discretion. Thus, a Petition for Writ of *Certiorari* will be granted only for compelling reasons. None are present in this case. There are no constitutional or federal issues implicated here. Consequently, the criteria established by this Court for the granting of a Petition for Writ of *Certiorari* do not exist in this action.

What is involved in this action is an interpretation by the Tennessee Supreme Court of the application of a state statute enacted by the Tennessee Legislature. Petitioner does not challenge the constitutionality of the TGTLA and it is conceded that the Court of Appeals was correct in finding that the City has immunity for actions predicated upon civil rights. Whether the Tennessee Wrongful Death Statute should come into play is strictly a local matter and does not raise a federal question.

III. There Are Other Compelling Reasons To Deny Petitioner's Motion To Amend Her State Court Claims In Addition To The Ruling By The Sixth Circuit Court Of Appeals.

A. The record does not support a claim based upon newly discovered evidence.

Petitioner contends that new facts revealed by discovery support a claim for negligence under the Tennessee Wrongful Death Act. The record in the case is unavailing. The first call that came in was a "hang call" and contained no information. Based upon this call, the officers were dispatched to the scene. In the meantime, a second call came in which described the deceased as a mental consumer. However, by the time the second call came in, the officers were at the scene and were engaged with the decedent. Under this scenario, there is no negligence. Unfortunately, the information that the decedent was a mental consumer did not reach the officers until it was too late.

B. By consenting to the dismissal of the state court claims, Petitioner abandoned her right to amend.

By agreeing to dismiss the state court claims pursuant to a consent order entered on February 6, 2006, and then a year and a half later Petitioner sought to reopen these claims without raising any new issues, Petitioner has abandoned her right to reinstatement of her state court claims. In the original

complaint and the second amended complaint which tracks the original complaint, Petitioner alleged that the Communications dispatcher failed to send the Crisis Intervention Team to the scene on being advised of the decedent's mental instability which constitutes negligence. This is the same issue which the Petitioner sought to reopen after the consent order of dismissal. In *State of Louisiana v. Litton Mortgage Company*, 50 F.3d 1298, 1303-04 (5th Cir. 1995), the court discussed certain factors which constitute abandonment. These factors include numerous amendments and the failure of these amendments to raise new claims. In *Litton*, the court concluded that Plaintiff was not entitled to amend the complaint. The same factors are present in this case and, therefore, Petitioner herein has also abandoned her right to reinstatement of the state court claims. *Id.*

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition for Writ of *Certiorari* herein be denied.

Respectfully submitted,

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